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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,
v.
CPC INTERNATIONAL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PRIVATE RESPONDENTS

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INTEREST OF AMICI *

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

The Chamber of Commerce of the United States ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector and region. Ninety-six percent of the Chamber's members are businesses with less than 100 employees. The Chamber regularly advocates the interests of its members in courts throughout the country on issues of national concern to the business community.

SUMMARY OF ARGUMENT

It is a fundamental principle of state corporate law that shareholders—including corporate shareholders—are insulated from liability for acts attributable to the corporations they own. Under state law, shareholders do not lose that insulation from liability simply because they actively participate in and exercise control over those corporations. Point I.

There is no statutory basis for the Government's argument that because CERCLA is a remedial statute, it should

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* Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief *amici curiae* and their letters of consent have been filed with the Clerk of the Court.

be construed to supplant state law and to impose retroactive liability on corporate shareholders whenever they "actively participate in and exercise control over" their subsidiaries, in order to permit the Government to enlarge the pool of "persons" liable to pay cleanup costs. U.S. Br. at I (Question Presented). Congress expressly defined the "persons" who are subject to CERCLA, and Congress's definition does not include "shareholders" of covered persons. 42 U.S.C. § 9601(21). And the Government's argument that Congress "plainly" intended to impose liability on *some* shareholders—those who exercise "too much" control—but not on others, finds even less support in the statutory text. Moreover, because corporate shareholders commonly participate in and exercise control over their subsidiaries, the Government's "participation and control" test would subject most parent corporations to liability under CERCLA. If Congress had intended for parent corporations to be liable for the operations of subsidiaries the parents controlled, it could easily have said so. But it did not. To the contrary, Congress's definition of the word "operator" does not by its plain meaning include an entity that "controls" another operator. Congress's definition plainly distinguishes between "operating" a covered facility and "controlling activities" at a facility, and makes clear that the latter is insufficient to establish liability under CERCLA. 42 U.S.C. § 9601(20)(A). Point II.

Moreover, the Government's proposed "participation and control" test would require this Court to find that Congress intended to ignore the extensive and well-established body of state corporate law, and to disrupt, *retroactively*, deeply embedded business expectations reasonably based on that body of law, by substituting a new federal common law for determining when a corporate "shareholder" is liable for acts attributable to a subsidiary it controlled. However, absent clear intent to the contrary,

and here there is none, Congress is presumed to have legislated against the backdrop of state law. Point III.

ARGUMENT

The Government's basic contention is that Congress intended to impose CERCLA liability, as "operators," on companies or individuals who owned stock in a corporation operating a covered facility and who exercised some unspecified degree of control over that corporation. Such a rule would completely undermine the basic principle of corporate law that shareholders are insulated from liability for the actions of the corporation they own. Shareholders frequently exercise control over the policies and conduct of corporations in which they have controlling interests, by electing a board of directors in which they vest the power and responsibility to conduct corporate affairs. When the shareholders are themselves corporations, those parent corporations often have directors or officers in common with their subsidiaries. Under state corporate law, the acts of those common directors and officers, when conducting the affairs of the subsidiary, are presumed to be on behalf of, and the responsibility of, the subsidiary and its board, *not* the shareholder parent. In certain cases, where the corporate form is abused and the distinction between the shareholder and the corporation is a sham, state law "pierces the corporate veil." But where the standards for piercing the veil have not been met, it is inconsistent with the very idea of a "corporation" to treat a corporation and a controlling shareholder as having jointly engaged in an activity—such as operating a facility—where the shareholder's only act was to control the corporation. As we show, there is no basis for concluding that Congress intended for courts to ignore that settled body of state law and to substitute an amorphous federal common law under which, in the vast majority of cases, subsidiaries that are operating facilities would be

treated as mere "agents" of their controlling shareholders, not as legally separate entities.

I. STATE CORPORATE LAW HAS ESTABLISHED SETTLED RULES FOR DETERMINING WHEN A CORPORATION'S SHAREHOLDERS ARE LIABLE FOR THE CORPORATION'S ACTIVITIES, AND THE GOVERNMENT'S PROPOSED TEST TRAMMELS THOSE RULES

CERCLA expressly provides that a "person" who "operated" a covered facility is liable, and that a "person" may be a "corporation." 42 U.S.C. §§ 9607(a)(2), and 9601(20), (21). Accordingly, courts have properly found corporations liable when they themselves were the "operators" of facilities.[1] The issue here is whether, in addition to such corporate "operators," Congress intended to hold liable their *shareholders* (whether corporations or individuals) whenever the shareholders "actively participated in, and exercised control over, the operations of [the] subsidiary," U.S. Br. at I (Question Presented), or "actively participate[d] in, and exercise[d] control over, the operations of [the] subsidiary's *facility*," U.S. Br. at 17 (emphasis added).[2] In arguing that this was Congress's intent, the Government totally ignores the well-established

[1] Here, and in the typical case, the *subsidiary* corporation was properly found to be the operator of the covered facility.

[2] Although these are the principal variants of the Government's proposed test, it also offers several other inconsistent formulations. *See, e.g.*, U.S. Br. at 8, 11 (exercising control over the subsidiary's "business"), 15 (participation in and control over "day-to-day management of the subsidiary's business"), 23 ("participat[es] in the management of a facility"), 25 ("exercises managerial or decision-making control"). The Government's inability to articulate and rely on a single test is itself powerful evidence that the Government's test does not flow "plainly" from the statutory language. *See* Point II.

body of state corporate law limiting the liability of corporate shareholders.

A. State Corporate Law Limits the Liability of Shareholders, Including Corporate Shareholders, for Acts That Are Ostensibly by and on Behalf of the Corporations They Own, Even When the Shareholders Actively Participated in and Exercised Control Over the Activities of Those Corporations

The most basic and uniform premise of state corporate law is that the corporation is not the "agent" of its shareholder owners, but a distinct and separate entity. The corollary of this premise is the principle of limited liability—shareholders are not liable for their corporation's acts. *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960); Harry G. Henn & John R. Alexander, *Laws of Corporations* §§ 73, 146 (3d ed. 1983); Wm. Meade Fletcher et al., 1 Fletcher Cyclopedia of the Law of Private Corporations § 25 (1997 Supp.). This same principle extends to *corporate* shareholders who own subsidiary corporations. The law treats the corporate parent just as it would any other shareholder, and extends to it the same limited liability the law extends to *any* shareholder. Wm. Meade Fletcher et al., 10 Fletcher Cyclopedia of the Law of Private Corporations § 4878 (1993); Wm. Meade Fletcher et al., 13 Fletcher Cyclopedia of the Law of Private Corporations § 6222 (1995); 18A Am. Jur. 2d Corporations § 856 (1985); *Grease Monkey Int'l, Inc. v. Godat*, 916 S.W.2d 257, 262 (Mo. Ct. App. 1995); *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988) (New York law).

Limited liability creates a strong presumption that the parent is not liable for acts that are ostensibly by and on behalf of a subsidiary. *NLRB*, 361 U.S. at 402-03 ("insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception"); 1 Fletcher Cyclopedia § 43 (1990); *Grease Monkey*, 916 S.W.2d

at 262. Under state law, this presumption is overcome only where the subsidiary does not have an independent will of its own and becomes what the law often refers to as the mere "alter ego" or "instrumentality" of the parent company.[3] Ownership alone, even 100 percent ownership, is not sufficient to pierce the corporate veil.[4] Thus, courts only "pierce the veil" and treat the two separate legal entities of parent and subsidiary as one entity where they are, in fact, operating as one—that is, where the subsidiary is a mere "front" for the parent, without an independent will or mind of its own. *Miles v. AT&T*, 703 F.2d 193, 195 (5th Cir. 1983) (Texas law); *see also Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1388-90 (7th Cir. 1994) (Illinois law); 1 Fletcher Cyclopedia § 43 (1990) (listing cases).[5]

[3] 1 Fletcher Cyclopedia § 43 (1990); *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1220 (10th Cir.) (Colorado law), *cert. denied*, 118 S. Ct. 55 (1997); *American Protein*, 844 F.2d at 60 (New York law); *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985) (state and federal common law); *TNS Holdings, Inc. v. MKI Sec. Corp.*, 663 N.Y.S.2d 144, 146 (N.Y. App. Div. 1997); *Villanueva v. Astroworld, Inc.*, 866 S.W.2d 690, 695 (Tex. Ct. App. 1993).

[4] *Jon-T Chems.*, 768 F.2d at 691; *Miles v. AT&T*, 703 F.2d 193, 195 (5th Cir. 1983) (Texas law); *Edwards Co. Inc. v. Monogram Indus.*, 730 F.2d 977, 986 (5th Cir. 1984) (en banc).

[5] Often courts also require an additional showing that failure to hold the parent liable would promote an injustice or fraud. 1 Fletcher Cyclopedia § 43.10 (1990); *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 775 (Ga. 1996); *Hystro Prods.*, 18 F.3d 1384 (Illinois law); *Jon-T Chems.*, 768 F.2d at 692-93 (Texas law requires additional showing of fraud in contract actions, but not in tort lawsuits); *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2*, 596 P.2d 227, 229 (Nev. 1979). A number of cases also require an additional element of causation, thus applying a three-part test: (1) mere alter ego; (2) improper or fraudulent purpose; and (3) causation between the improper purpose and the injury. 1 Fletcher Cyclopedia §§ 43, 43.10 (1990). There are thus several formulations of the veil piercing test, but they all ask whether the parent and subsidiary were in reality one entity.

Parent corporations routinely participate in and control the activities of their subsidiaries. That is common practice among the corporate members of NAM and the Chamber, and is the norm throughout the country.[6] "In reality, in the normal course of operations a corporate parent will have both an ownership interest in the subsidiary and effective control over the management and operations of the subsidiary."[7] But that is not sufficient to eradicate the distinction between the two separate legal entities of parent and subsidiary. 1 Fletcher Cyclopedia § 25 (1997 Supp.); *id.*, § 43 (1990); Henn & Alexander, *supra* §§ 148, 207; William O. Douglas and Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 196 (1929-30). If it were, nearly every subsidiary would be an alter ego of its parent. *See Jon-T Chems.*, 768 F.2d at 691.

The Government is flat wrong when it contends that it is atypical for a parent and subsidiary to share officers. *See* U.S. Br. at 44. A common incident of ownership frequently present in the parent/subsidiary relationship is identical or overlapping corporate officers and directors.[8]

[6] Fletcher Cyclopedia § 43.10 (1990) ("domination is a factor that will always be present in parent-subsidiary relationships"); *American Protein*, 844 F.2d at 60 (New York law).

[7] Richard G. Dennis, "Liability of Officers, Directors and Stockholders Under CERCLA: The Case for Adopting State Law," 36 Vill. L. Rev. 1367, 1436 (1991).

[8] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89, 111 (1985) (noting that it "often will be the case" that "managers of subsidiaries . . . are also managers of the parent"). *See also* 18A Am. Jr. 2d Corporations § 857; Henn & Alexander, *supra* § 148; *American Protein*, 844 F.2d at 57 (New York law) ("it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary"); *Miles*, 703 F.2d at 195 (Texas law); *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir. 1963); *Ciprotti v. United Inns, Inc.*, 433 S.E.2d at 585, 587

Again, that is a common practice among the corporate members of NAM and the Chamber. Courts uniformly have found that this factor alone does not "justify treatment of the two [legal entities] as one business unit." *Miles*, 703 F.2d at 195. Nor do communications between the two distinct legal entities signify any atypical relationship. The Government's proposed test would wrongly attribute to the shareholder parent any act taken by a director or officer of a subsidiary who is also a director or officer of the parent.[9] But state law recognizes and presumes that overlapping directors and officers "can change hats and represent the two corporations separately, despite their common ownership." *Jon-T Chems.*, 768 F.2d at 691; *see also* Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. at 196-97. Thus, an officer or director acts *for the subsidiary* when conducting the subsidiary's business, including communicating with the parent, and those acts do not transfer to the parent the liability and responsibility of the subsidiary board for conducting the subsidiary's corporate affairs. That is the rule unless there is strong evidence that the individual was acting *only* in his or her capacity as an officer or director of the parent, or the acts are actually contrary to the interests of the subsidiary.[10] It is only where other factors are present that the parent and subsidiary are held to be one entity rather than two.[11]

(Ga. Ct. App. 1993); *Korson v. Independence Mall I, Ltd.*, 593 So.2d 981, 984-85 (La. Ct. App. 1992); *Total Care Health Indus. v. Department of Soc. Serv.*, 535 N.Y.S.2d 15, 17 (N.Y. App. Div. 1988).

[9] Worse, the Government attributes the *same* acts to *both* the subsidiary and parent in order to make both liable as operators.

[10] *See, e.g., Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997); *Jon-T Chems.*, 768 F.2d at 691; *Edwards Co. v. Monogram Indus., Inc.*, 730 F.2d at 985-86; *Fisser v. International Bank*, 282 F.2d 231, 238 (2d Cir. 1960).

[11] Although ownership and shared officers and directors can be *relevant* factors under state veil piercing doctrine, they are not

B. The Government's Proposed Test Ignores and Would Completely Undermine State-Law Norms of Corporate Liability, Effectively Converting Subsidiaries Into the Parents' Agents

Contrary to the norms of state corporate law, the Government contends that the parent should be *directly* liable when it "actively participated in, and exercised control over, the operations of a subsidiary." U.S. Br. at I. In its only concrete example, the Government argues that "[i]f the parent corporation . . . employs *its own agents* as executive officers (or as board members performing the typical functions of an executive officer) to manage the subsidiary, then a court may conclude that the parent corporation is, in fact, 'operating' the subsidiary's facility" and should be held directly liable. U.S. Br. at 44 (emphasis added). Thus, even though the fact of identical or overlapping board members or officers would be insufficient under state corporate law to disregard the subsidiary's status as a distinct legal entity, under the Government's expansive test, that fact alone would expose

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dispositive, as they would appear to be under the Government's proposed test. *Compare* U.S. Br. at 44 *with* 1 Fletcher Cyclopedia § 43.20 (1990); *Jon-T Chems.*, 768 F.2d at 691-92; *Steven*, 324 F.2d at 161. Instead, other factors must be examined to determine if the separate corporate identity of the subsidiary is really a sham, including whether: (1) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings; (2) the subsidiary operates with grossly inadequate capital; (3) the parent and subsidiary file consolidated financial statements and tax returns; (4) the parent uses the subsidiary's property as its own; (5) the subsidiary receives no business except that given to it by the parent; (6) the parent and subsidiary have common business departments; and (7) the daily operations of the two corporations are not kept separate. 1 Fletcher § 43 (1990); *see also Jon-T Chems.*, 768 F.2d at 691-92; *Steven*, 324 F.2d at 161. These factors are not exhaustive. Each court looks at the totality of the circumstances to determine whether the subsidiary and parent are not, in fact, two separate entities. *Id.*

many parent corporations to liability under CERCLA as "operators."

The Government's test treats a subsidiary's directors and officers as the *agents* of the subsidiary's *shareholders*. This is a dramatic break with state corporate law principles. Board members are not agents of the shareholders who elect them. Henn & Alexander, *supra* § 207 ("Although elected by the shareholders and removable by them for cause and possibly without cause, the directors are *not the agents* of the shareholders") (emphasis added). Nor are officers of a corporation the agents of that corporation's parent; they act with delegated authority from the *subsidiary* corporation's Board—on behalf of the subsidiary. *See* Wm. Meade Fletcher et al., 2 Fletcher Cyclopedia of the Law of Private Corporations § 505 (1990); Henn & Alexander, *supra* § 219. And the subsidiary corporation is not the agent of its parent or the parent's shareholders, regardless of the fact that it ultimately functions in their interests, as subsidiaries are appropriately expected to do.[12] To hold otherwise would be contrary to the most fundamental principle of corporate law—separation between owner and corporation.

The flaw in the Government's "agency" argument is highlighted in the context of a subsidiary corporation not wholly owned by another corporation. If, for example, corporation A owns 75% of a subsidiary, and corporation B owns 25% and an officer of A serves also as an officer of the subsidiary, his actions for the subsidiary cannot be regarded as the actions of corporation A. When he acts for the subsidiary, the officer has an obligation to serve the interests of the subsidiary. He could not be an agent of shareholder A without violating the fiduciary obligations he owes to the subsidary and, ultimately, to shareholder B.

[12] The subsidiary is only treated as the agent of the parent corporation where state law veil piercing is appropriate. *See* Frederick J. Powell, *Parent and Subsidiary Corporations* §§ 21-22 (1931).

C. The Government's Proposed Test Would Disrupt the Settled Expectations of Participants in the Marketplace.

As this Court has recognized, "[i]n structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739 (1979). Settled rules are particularly important in the commercial context, because they encourage settled expectations and thereby "foster investment by businesses and individuals." *Quill Corp. v. North Dakota*, 504 U.S. 298, 316 (1992). *See Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) (basic features of corporations "such as limited liability . . . enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments"). *See also* Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89, 90-95 (1985) (purpose of limited liability rule is to encourage investment and credit which in turn spur economic growth).[13]

Adoption of the Government's proposed test would unquestionably disrupt the settled expectations of participants in the marketplace. "[A] stockholder who has invested in a corporation prior to the advent of the new [Government test], believing that his liability would be limited except [when the corporate veil can be pierced], now would find himself potentially personally liable under the CERCLA rules simply by virtue of his participation in the management of the corporation. He would not have contemplated or evaluated potential liability of this nature prior to in-

[13] The law has developed these limited liability principles to advance the economic interests of society as a whole. When individuals choose to incorporate, they obtain the benefits of limited liability. But their corporations must then pay separate taxes and comply with extensive regulations and requirements that are applicable only to corporations.

vesting in the corporation." Richard G. Dennis, Liability of Officers, Directors and Stockholders Under CERCLA: the Case for Adopting State Law, 36 Vill. L. Rev. 1367, 1506 (1991). Put simply, the Government's proposed test, particularly given its vagueness and breadth, "will thwart the ability of a stockholder to evaluate the risk before investing." *Id.*

Moreover, the disruption of settled expectations and impairment of rational business planning that would result from adoption of the Government's test is not limited to shareholders. That test would significantly impact those who contract with shareholders. For example, those who lend to parent corporations would have to assess the risk of parental liability based on the Government's amorphous test; insurance companies would have to attempt to ascertain the potential exposure of parent corporations for their subsidiaries' operations. In the past these third parties have been able to look to well-established state law to govern the potential liability of the parent corporation or stockholder; that law allowed them to focus on the parent's own activities on its own behalf (absent evidence sufficient to pierce the corporate veil). Further, under the Government's test, these lenders and insurers would have to consider not only environmental damage attributable to the parents' activities, but also damage attributable to their subsidiaries, since under CERCLA, if a parent is liable at all, it is potentially liable for *all* cleanup costs. "Thus, the commercial relationships predicated on traditional state piercing the corporate veil and direct liability laws would be disrupted on an ongoing basis." *Id.* at 1510. *See also id.* at 1511 ("Anyone working for, investing in or extending credit to a corporation (or to a corporation's officers, directors or stockholders) will certainly have a substantial body of expectations concerning the law of liability, based on long traditions and precedent.").

The disruption to settled commercial expectations is exacerbated by the fact that CERCLA not only imposes strict liability (thereby creating potential exposure to

literally billions of dollars of damages), but also has been interpreted to impose *retroactive* liability.[14] Thus, under the Government's test, parent corporations and stockholders could be held liable for actions taken by their subsidiaries decades ago, based on their participation in the subsidiaries' activities decades ago; indeed, the subsidiaries' actions may have been completely legal at the time, and may have been encouraged, or even *required*, by state or federal regulation. At the time the actions were engaged in, the parties reasonably relied upon settled state law principles of limited liability, and those principles encouraged and fostered the commercial endeavor. Accordingly, although the constitutionality of retroactive application of CERCLA is not presently before the Court, the statute's sweeping impact counsels against adoption of the Government's invitation to expand the scope of retroactive application further than can be justified by the text of CERCLA.

II. CERCLA CANNOT FAIRLY BE READ TO IMPOSE LIABILITY ON A SHAREHOLDER CORPORATION AS AN "OPERATOR" OF A SUBSIDIARY CORPORATION'S FACILITY SIMPLY BECAUSE THE SHAREHOLDER ACTIVELY PARTICIPATED IN OR EXERCISED CONTROL OVER THE SUBSIDIARY, OR ITS FACILITY

If Congress had intended CERCLA to eliminate the limited liability that is a fundamental feature of corporate law, it surely would have said so. But it did not. The Government, however, seeks to reach that result by arguing that Congress's use of the term "operator" *itself* reflects a clear intent to reach all parties that functionally control companies that, in turn, are operating a facility. That argument ignores the crucial fact that we are dealing

[14] The retroactive application of CERCLA raises significant constitutional questions that have not been resolved by this Court. Expanding the scope of CERCLA as the Government proposes would greatly exacerbate those constitutional problems.

with facilities operated by *corporations*, and the parties the Government is seeking to hold liable are corporate *shareholders* who acted only to manage or control those corporations. If Congress had intended to reach such entities, one would expect to find some language in the statute expressly holding shareholders liable for the actions of corporate operators.[15] But no such language exists.[16]

A. Nothing in the Language of the Act Supports the Government's Position.

The Government's "plain meaning" argument is implausible on its face. It is hardly likely that Congress decided to enact a greatly watered-down version of traditional state-law veil piercing—under which all shareholders who exercised control over corporate operators would themselves be liable in a broad range of circumstances that would not justify liability under state law—and then decided to convey that preemptive message simply by using the term "operator" to describe a category of "persons" liable under CERCLA. If Congress had wanted to mandate such a rule, it would have said so in one of three places: the listing of "covered parties" in § 9607(a); the definition of "owner or operator" in § 9601(20)(A); or

[15] Congress has enacted legislation expressly making shareholders, parents and affiliated corporations liable for the acts of the corporations they own or are affiliated with when that was Congress's intent. *See, e.g.*, 15 U.S.C. § 31 ("owned, chartered, controlled, or operated"); 15 U.S.C. § 77o (those "who, by or through stock ownership, agency or otherwise . . . control"); 15 U.S.C. § 78t (those "who, directly or indirectly, control"); *see also* 29 U.S.C. §§ 203(r), 1301(b)(1); 15 U.S.C. § 24 (directors, officers and agents). Similarly, Congress could easily have imposed liability on persons who "directly or indirectly" operate a facility. But it did not.

[16] *All* of the examples contained in the statutory definition of "person" describe entities that would themselves be liable for *their* ownership or operation of a facility. There are no examples of "persons" who are included in the definition because of their affiliation or *relationship* with such a covered entity. That is particularly significant because 42 U.S.C. § 9601(21) says the term "person" "means" the listed entities, not that it "includes" them.

most naturally, in the definition of "person" in § 9601(21). *See Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) ("If Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so.") *None* of these provisions, however, gives the slightest indication that Congress wanted to reach controlling shareholders of corporate "operators."

Section 9607(a). Although 9607(a)(1) (referring to "*the* owner and operator") suggests that Congress made the common-sense assumption that ordinarily each facility would have only one operator, the Government finds significant the fact that in § 9607(a)(2), the statute uses disjunctive language—imposing liability on any person who at the time of disposal of any hazardous substance "owned *or* operated" a facility. U.S. Br. at 21. This word choice merely indicates that Congress intended to cover non-owner "operators." The evident purpose of separating ownership from operation was to ensure that an owner of title to a facility would not be the only liable party in a situation where the facility is operated by a separate lessee. But Congressional intent to impose liability on the operator as well as the owner does not mean, or even suggest, that Congress intended to impose liability on the operator and the controlling *shareholders* of that operator.

Section 9601(21). In § 9601(21), Congress provided that the "term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity" or various governmental entities. This definition provides no indication Congress intended to disregard the usual significance accorded to distinctions among corporate entities and between corporations and their shareholders, and to impose liability on the corporate *shareholders* of corporate operators. Moreover, this definition provides even less support for the Government's assertion that Congress "plainly" intended to impose liability on *some* shareholders—those who actively participate in or control the corporations in which they invest—but

not others. CERCLA contains *no* language suggesting that affiliation with or control over a corporate operator would be a basis for liability—let alone language providing guidance about what kinds of affiliation and control would suffice. This is another indication that Congress intended to respect the legally separate nature of "corporations" and their shareholders established by state law.[17]

Section 9601(20). The statute defines "operator" simply as "any *person* . . . *operating*" a facility. 42 U.S.C. § 9601(20)(A) (emphasis added). The Government extrapolates from dictionary definitions of "operate" to the conclusion that Congress intended to hold liable any entity exercising control over a company operating a facility. This so-called "plain meaning" interpretation is singularly unpersuasive. The term "operator" does not, in common parlance, include those who exercise *control* over operators. The "operator" of a car is the driver, not someone in the back seat giving advice or instructions, and the operator of an airplane is the pilot, not an air traffic controller. *See Massey v. City of New York*, 589 N.Y.S.2d 145, 147 (Sup. Ct. 1992) (school crossing guard who controlled vehicles within approaches to intersection did not "operate" a vehicle within meaning of state statute).[18]

[17] The definition of "person" parallels the definition used in other federal environmental statutes. *See* 33 U.S.C. § 1362(5) (Clean Water Act); 42 U.S.C. § 6903(15) (Resource Conservation and Recovery Act). And none of those statutes has been interpreted to expose (corporate or individual) shareholders of corporate actors to liability.

[18] The Government suggests that a company would be an operator of a business like a railway if it "'directs[s] the working of'" or "'manages'" the railway. U.S. Br. at 20 (quoting *Oxford English Dictionary* (2d ed. 1989)). But that is not the plain or natural meaning. To the contrary, this Court has held that the corporation that owns a railway "operates its own road," even if that corporation is owned and controlled by a parent corporation. *Pullman's Palace-Car Co. v. Missouri Pacific Ry. Co.*, 115 U.S. 587, 596 (1885); *see id.*, at 597 ("Practically [the parent] may control the [subsidiary], but the [subsidiary] alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs.").

For that reason, when Congress wanted to adopt a broader conception of "operator"—in the closely analogous context of imposing liability for black lung benefits—it did so expressly by defining the term to include one who "operates, *controls, or supervises*" a coal mine. 30 U.S.C. § 802(d) (emphasis added) (enacted in 1969 and substantively revised in 1977, just three years prior to passage of CERCLA). As Congress obviously recognized in passing that provision, controlling or supervising a facility would not be considered "operating" that facility, unless a statute expressly included such a broader definition. Here, by contrast, Congress not only avoided use of such broad language but drew an express distinction between "operating" and "controlling" *in the same paragraph*. In the special case of a facility conveyed for specified reasons to a unit of State or local government, the statute defines "owner or operator" as "any person who owned, operated, *or otherwise controlled activities at such facility* immediately beforehand." 42 U.S.C. § 9601(20)(A)(iii) (emphasis added). Under the Government's interpretation, however, this additional language would be redundant.[19] This portion of the definition is thus a strong indication that Congress did not equate "operation" with "control," and instead made a deliberate decision that exercising "control" was sufficient only in a narrow category of cases where a facility has been transferred to state or local government.[20]

[19] Of course, it is an "ancient and sound rule of construction that each word in a statute should, if possible, be given effect." *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

[20] *See Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) ("No such 'control' test appears in subsection (ii), . . . and we will imply none."); Richard S. Farmer, "Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard," 19 J. Corp. L.

In sum, the plain language of the statute—far from mandating that a corporation and its controlling shareholder be deemed jointly liable for actions taken by the corporation—says nothing of the kind. Reduced to its essence, the Government's argument is that Congress relied on the courts to discern in its selection of the word "operator" a clear intent to impose liability not only on companies directly operating facilities, but also on their shareholders, if those shareholders exercise too much control. The word "operator" cannot bear the weight the Government's argument requires.

B. Neither of the Government's Other Arguments Justifies Treating Controlling Shareholders as "Operators"

The Government attempts to shore up its remarkably weak textual argument by drawing an analogy to the statutory treatment of lenders, and by arguing that its proposed test is consistent with the "statutory objectives." Neither argument has merit.

The Lender Liability Analogy. In § 9601(20), Congress dealt with the special problem presented by lenders who would ordinarily be liable as "owners" because they hold indicia of ownership to protect security interests in

769, 792 (1994) ("By not including a provision for direct controlling person liability in the previous liability provision, Congress manifested its intention not to impose direct liability on such persons or corporations."). Congress drew the same distinction between operation and control in the 1986 Superfund Amendments, which included a new definition of the term "facility": "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites *and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person)*." 42 U.S.C. § 11049(4) (emphasis added). This provision contemplates situations in which affiliated companies, such as a parent and a subsidiary, separately own adjacent buildings or equipment, and makes clear Congress's understanding that such buildings are *not* "operated by the *same* person" even where the parent "controls" the subsidiary. Here again is confirmation that "control," in the view of Congress, simply is not the same as "operation."

facilities. Congress exempted this category of owner from the automatic liability that would otherwise have attached, and then created an exception to the exemption if the lender "participat[ed] in the management of a . . . facility." 42 U.S.C. § 9601(20)(A)(iii), (E)(I)(i). The Government argues that "[b]y the same reasoning, a stockholder or parent corporation that 'participate[d] in the management' of a facility is potentially liable as an 'operator.'" U.S. Br. at 23.

This argument is flawed for two reasons. First, there is no parallel provision in the statute stating that shareholders of operators are liable if they "participated in the management" of the operator. The lender liability provisions show that Congress knew how to base liability on "participation" or "control" if it wanted to. But it did so only with respect to lenders with indicia of ownership.

Second, there is no basis for *assuming* that Congress intended for courts to use the criteria applied to exempt one category of "owners" (lenders with indicia of ownership of a facility) to define the situations in which a category of *non*-owners (shareholders of an operator) would be held liable as "operators." As the EPA itself noted in 1992, "[c]ourts considering the meaning of section [9601(20)(A)] have also made clear that 'participation in management' and 'operator' *do not have the same meaning.*" 57 Fed. Reg. 18,344, 18,359 (1992) (citing cases) (emphasis added).[21] The EPA noted that "facts showing operation of a facility will be sufficient to establish participation in management," *id.*, but impliedly recognized that the obverse is not true.[22]

[21] The EPA was commenting on the final rules that were later incorporated into the detailed statutory exemptions for lenders on which the Government here relies.

[22] In any event, the Government fails to recognize that the statutory standards applied to lenders require a much more substantial degree of "participation in management" than would be needed to hold shareholders liable under the Government's proposed test. The secured lender provisions define "participation in management" as (1) exercising "decisionmaking control" such that the lender "has undertaken responsibility for . . . hazardous substance handling or

Consistency With Statutory Objectives. The Government suggests that its proposed test is consistent with the goal of seeking payment from those "responsible" for problems caused by disposal of hazardous materials. U.S. Br. at 26. But actual responsibility simply is not the touchstone for liability under CERCLA. *See* Richard Stewart & Bradley Campbell, "Lessons from Parent Liability Under CERCLA," 6 Nat. Resources & Env't 7, 7-8 (ABA Section of Natural Resources Law 1992) (noting that the scope of liability under CERCLA cannot be justified by reference to traditional tort goals of compensation and deterrence and the goal of placing responsibility for clean-up on those responsible for the problem). CERCLA imposes strict liability on parties regardless of whether they were "responsible" for committing any act that was illegal at the time of the act—indeed, often regardless of whether they committed any *act* relating to hazardous substances. For example, an "owner" of a facility can be liable even if it was merely a lessor of the property,[23] and a generator

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disposal practices," or (2) controlling the "overall management" of a facility encompassing "day-to-day decisionmaking with respect to environmental compliance" or encompassing "all or substantially all of the operation functions . . . other than the function of environmental compliance." 42 U.S.C. § 9601(20)(F)(ii).

Indeed, the statute specifically provides that a lender would *not* become a participant in management by contractually mandating any form of "environmental compliance," *id.* § 9601(20)(F)(iv)(II), by monitoring the facility and enforcing compliance mandates, *id.* § 9601(20)(F)(iv)(III), (IV), or even by requiring a "response action or other lawful means of addressing the release or threatened release of a hazardous substance," *id.* § 9601(20)(F)(iv)(V). Under the Government's theory, by contrast, any or all of these kinds of participation in management by a *parent corporation* would make the parent an "operator" fully liable under the statute.

[23] 42 U.S.C. §§ 9607(a)(1), (b); *see Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 682 (4th Cir. 1995) (owner is liable even if third party was sole cause of release and owner exercised due care to guard against foreseeable acts and omissions of third party, if the third party caused the release in connection with a contractual relationship with the owner such as a lease), *cert. denied*, 116 S. Ct. 1318 (1996).

of hazardous waste that was delivered to a transporter is strictly liable for any dumping of the material, regardless of the circumstances. 42 U.S.C. §§ 9607(a)(3), (b). Accordingly, there is no reason to believe Congress intended the otherwise irrelevant factor of "responsibility" to be *dispositive* when deciding whether a "shareholder" should be held liable. Indeed in the context of a statute imposing liability *without* fault or moral responsibility, it would have been easy for Congress to have imposed liability on parent corporations of subsidiary corporations that were themselves liable as owners or operators, if Congress had wanted to impose liability on all parties that were affiliated with, or had the power to control or supervise, entities that would be liable as owners or operators. But it did not.[24]

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[24] Although this is a remedial statute, Congress obviously did not intend to impose liability on every entity that had ever had anything to do with ownership or operation of a covered facility. For example, although the *current* "owner and operator" of such facilities is always liable, a *previous* "owner or operator" of a facility is *not* liable unless hazardous substances were disposed of during his period of ownership or operation. 42 U.S.C. §§ 9607(a)(1), (2). Under this statutory scheme, if corporation A owned and operated a facility which disposed of hazardous substances between 1840 and 1940, and corporation B owned and operated the same facility from 1940 until immediately before passage of CERCLA, and corporation C owned and operated the same facility from that point until enactment, and neither B nor C disposed of any hazardous substances, under CERCLA corporations A and C would be strictly and jointly and severally liable for all costs of cleaning up the hazardous substances disposed of between 1840 and 1940, but corporation B would not be liable at all. Obviously, if Congress *had* wanted to impose liability on as many deep pockets as possible, it could have imposed liability not only on current owner/operators, who might have owned and operated for only a few weeks, but also on previous owner/operators, who might have owned and operated for decades. But it did not. Thus, CERCLA cannot be interpreted simply by construing its provisions to cast the broadest net possible, because that was obviously not Congress's objective. *See generally Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986) (cannot invoke "plain purpose" of statute at expense of terms of the statute itself; even if Congress unanimously agrees to

It makes even less sense for the Government to theorize that Congress intended to draw a line imposing liability on *some* corporate parents based on their degree of involvement in the management of a subsidiary operator. Why would Congress have invited such a fact-intensive inquiry to decide whether particular shareholders should be liable?[26]

Nor does the Government explain why Congress would have wanted to enact a special rule of liability for shareholders of corporate *operators* without doing so with respect to shareholders of corporate *owners*. Short of piercing the corporate veil, the Government would presumably concede that in a case where a corporation is liable solely as an owner—because it owned title to a facility but did not conduct any of the operations—a parent of that corporation would not also be liable as an "owner" even if it actively exercised control over its subsidiary.[26] Yet it posits that Congress intended radically different treatment of shareholders of "operators," even though there is no language in the statute reflecting such intent.

Finally, the Government also suggests that its rule creates an "incentive" for parents to control the actions of their subsidiaries. But just the opposite is true. As the Sixth Circuit observed, under the Government's proposed test, "the threat of unlimited liability will likely deter

remedial purpose, differences in how to effectuate are often reflected in compromise final language).

[26] This amorphous test would embroil the federal courts in extensive litigation and would consume enormous societal resources. Congress has expressed concern over the amount of monies expended on litigation regarding who is liable for cleanups, rather than on performing the cleanups themselves. *See, e.g.*, H.R. Rep. No. 582, 103d Cong., 2d Sess. 100 (1994).

[26] *See Amcast Indust. Corp. v. Detrex Corp.*, No. 588-620, 1990 U.S. Dist. LEXIS 15191 at *8 (N.D. Ind. 1990) (refusing to hold former stockholders of corporation liable as "owners" of facility with respect to property actually owned by corporation, reasoning that nothing in CERCLA "even remotely suggests a Congressional intent to abrogate the common law of corporations by subjecting stockholders to liability as the 'owners' of corporate property").

private sector participation in the cleanup of existing sites." Pet. App. 14a. Under the Government's proposed test, a parent corporation that does *nothing* to control its subsidiary—and sits idly by while the subsidiary improperly dumps hazardous materials—would not be held liable. *See* U.S. Br. at 31 n.17 (expressly rejecting the Fourth Circuit's test imposing liability by virtue of a party's *authority* to control a facility). It is only when the parent becomes involved in management of the operations of the subsidiary that it risks liability under the Government's vague and expansive definition of the term "operator."[27] Here again, it is implausible to suppose that Congress—having decided *not* to impose liability on all parents simply by virtue of their power to control subsidiaries—nevertheless chose to hold liable a subcategory of parents that actually exercised such control.

III. THE COURT SHOULD REJECT THE GOVERNMENT'S INVITATION TO SUBSTITUTE A NEW FEDERAL COMMON LAW FOR DETERMINING SHAREHOLDER LIABILITY IN PLACE OF THE WELL-ESTABLISHED BODY OF STATE COMMON LAW.

Because the "participation and control" test the Government advocates has no foundation in the statutory language, the Government is, in effect, urging the creation of a body of federal common law to determine when a corporation's *shareholder* is liable under CERCLA for the corporation's operation of a facility. But the Government cannot even articulate what the test is. Instead, the Government proposes a vague standard that must be worked out by the courts by applying unspecified factors, in an unguided fashion, on a case-by-case basis. *See, e.g.*, U.S. Br. at 44 n.32 (acknowledging "inherently fact-based"

[27] Under the Government's test, a parent could be held liable because it was involved in operations of a facility unrelated to any discharge of hazardous materials. Moreover, a parent would be liable if it became involved with the subsidiary's discharges of hazardous materials solely for the purpose of developing an alternative system that was *not* environmentally damaging. Liability in that circumstance would *disserve* CERCLA's goals.

nature of the inquiry and lising "some" of the relevant factors); n.2 *supra*.[28] There is no basis for adopting this nebulous federal common lav test in place of the well-established body of state common law that has been used for decades to determine when it is appropriate to look beyond the corporate actor to the (individual or corporate) shareholder for liability purposes.

Given that Congress did not "speak directly to the question" of the liability of a corporation's shareholders for operations by and on behalf of the corporation, CERCLA must be presumed to "favor[] the retention of long-established and familiar principles" of limited liability under state law. *United States v. Texas*, 507 U.S. 529, 534 (1983) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), illustrates this principle in an analogous context. In *O'Melveny*, this Court unanimously refused to substitute federal common-law for state corporate law. *O'Melveny* involved an action by the FDIC, as receiver for a failed savings and loan association, against that corporation's former legal counsel, alleging professional negligence and breach of fiduciary duty stemming from the lawyers' failure to inquire into the S&L's financial status. The law firm argued that, under state common law, the S&L officers' knowleige of corporate wrongdoing must be imputed to the corporation, and therefore the FDIC, standing in the shoes of the corporation as receiver, was estopped from suing the law firm. The FDIC urged the creation of federal common law for determining whether knowledge of corporate officers is imputed to the

[28] The Government assures the Court that "mere investors" or "interested investors" or investors who act in a manner "consistent with their investment relationship," or who exercise "mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship" would not be held liable as operators. U.S. Br. at 30, 35 n.21, 43 n.31. But the Government's assurances would not avoid the necessity for extensive litigation to decide when an investor is acting appropriately or consistently with its investment relationship.

corporation and to the FDIC when it sues as receiver of the corporation. The *O'Melveny* Court refused to "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." 512 U.S. at 85. The Court cautioned that creation of federal common law is proper only in "extraordinary cases." *Id.* at 89. Unless there is a "significant conflict with an identifiable federal policy or interest," state law governs. *Id.* at 88.[29] As in *O'Melveny*, "this is not one of those cases in which judicial creation of a special federal rule [is] justified." *Id.* at 87.

The Government argues that adherence to the limited liability norms that are the fundamental feature of state corporate law "would frustrate Congress's intent to provide a national solution to the nationwide public health and environmental problems resulting from hazardous waste disposal." U.S. Br. at 40. As this Court has explained, "[t]o invoke the concept of 'uniformity,' however, is not to prove its need." *Atherton v. FDIC*, 117 S. Ct. 666, 671 (1997). Nothing in the text or legislative history of CERCLA demands uniform liability standards, particularly in the context of shareholders' and parents' liability as operators.[30] In *O'Melveny*, the Court specifically re-

[29] Even in the context of federally chartered corporations, this Court has declined to create a federal body of corporate law, instead relying upon state corporation law. *See Atherton v. FDIC*, 117 S. Ct. 666, 669-76 (1997) (holding that state law, not federal common law, governs the standard of care owed by officers and directors to federal savings banks). Reliance on state law is even more appropriate in cases, such as this, involving state chartered corporations, which literally exist only because of state law.

[30] The Government cites the isolated comments of one legislator on the House Floor in support of its claim that Congress intended uniformity. *See* U.S. Br. at 40 n.27 (citing 126 Cong. Reg. 31,968-969 (remarks of Rep. Florio)). But the record reflects that Representative Florio was addressing specifically the quite different issue of joint and several liability, and he opined that CERCLA would encourage the development of federal common law "in this area." *Id. See also* 126 Cong. Rec. 31,965. There is no evidence that any

jected the argument that state law should be supplanted by federal common law in order to "facilitate . . . nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty." 512 U.S. at 88. The Court explained that acceptance of that argument would result in the courts being "awash in 'federal common-law.'" *Id.* *See also United States v. Kimbell Foods, Inc.*, 440 U.S. at 730 (rejecting "generalized pleas for uniformity").

Uniformity arguments are particularly inappropriate with regard to CERCLA, in which Congress contemplated and expressly sanctioned the continued operation of state law, thereby making uniform enforcement of liability impossible. For example, to secure repayment of costs, CERCLA establishes a lien in favor of the United States on real property subject to or affected by a CERCLA cleanup. 42 U.S.C. § 9607(l)(1). The priority of the lien against other creditors, however, is expressly governed by state law. *Id.* § 9607(1)(3). Congress also provided that state law may set the degree of cleanup that any federal remedial action of a hazardous substance must attain, if the state law is more stringent than federal law. *Id.* § 9621(d)(2)(A). In addition, Congress provided for the efficacy of private indemnity agreements, *id.* § 9607(e), which the courts have uniformly held are interpreted under state law. *E.g., Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212 (3d Cir. 1994).[31] This Court has recognized

other member of Congress shared even that view, and no evidence that Rep. Florio or any other member of Congress intended federal law to govern all aspects of CERCLA liability. Indeed, Congressman Florio referred to and inserted as part of his remarks an analysis by the U.S. Department of Justice, and that analysis cites *only* state law for the proposition that "common law provides for joint and several liability where the act or omission of two or more persons results in an indivisible injury." 126 Cong. Rec. at 31,966 (letter from Assistant Attorney General Alan Parker) (citing Prosser, the Restatement of Torts, and Indiana case law).

[31] In contrast, certain *contribution* issues under CERCLA are expressly governed by federal law. 42 U.S.C. § 9613(f) (claims

that where, as here, Congress enacts a statutory scheme that relies upon state law, any "assumption" that uniformity is necessary is foreclosed. *See Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 209 (1946).

Indeed, if resort to the legislative history were necessary, the legislative history strongly suggests that Congress intended for courts to rely on state common law when interpreting and enforcing CERCLA. There are no Senate or House reports on the bill that became CERCLA because it was a floor amendment offered one week before enactment. Accordingly, the floor statements of the bill's sponsors—Senators Stafford and Randolph—constitute the best indication of how Congress intended the statute to be interpreted. In discussing which persons would be liable under CERCLA for costs resulting from a "federally permitted release," Senator Randolph said: "The fund in recouping such costs, or any private damage actions, must rely on other law—*common law* or Federal or State statutory law—in lieu of the liability provisions of section 107 [42 U.S.C. § 9607]. The determination of exactly what liability standards, defenses, or other rules apply will be made on a case-by-case basis pursuant to regimes other than that of this bill." 126 Cong. Rec. 30,932 (emphasis added). Because "common law" normally means state common law, and Senator Randolph did not say "federal common law," and because he specified both federal and state "statutory law," the plain and natural meaning of this statement is that "liability standards" would be determined by statutes or by state common law. That meaning is confirmed by Senator Stafford, the co-sponsor, who told his colleagues that the bill was "*not* an embodiment of

regarding contribution shall be brought in accordance with Federal Rules of Civil Procedure and governing law shall be federal law). This Court has declined to interpret statutes including such express provisions as requiring federal uniformity in connection with other provisions, despite congressional silence regarding those other provisions. *See O'Melveny*, 512 U.S. at 79 (invoking "[i]nclusio unius, exclusio alterius").

other forms of no fault liability or innovative Federal intrusion into the law now developing *within individual State jurisdiction*." 126 Cong. Rec. 30,986 (emphasis added). *See also* 126 Cong. Rec. 30,984 (Stafford) (noting that "no obligations or liabilities of any person under other Federal or State law, including common law, are diminished by the provisions of [CERCLA]"). Thus, the legislative history, though sparse, strongly suggests that Congress did not intend to displace state law.

Moreover, reliance on state law would not conflict with or thwart CERCLA's purposes. The Government argues that adherence to state law "would thwart the fundamental policy expressed in CERCLA that those who are responsible for creating hazardous conditions, rather than the innocent public, should bear the costs of responding to those hazards." U.S. Br. at 41. First, as noted *supra*, pp. 20-21, CERCLA actually imposes liability without regard to fault or moral responsibility; owners and operators are liable even if they did *not* create the hazardous conditions, and they have been held liable even if their actions were legal at the time, or even mandated by state regulators. Moreover, an assertion that "responsible" parties should be liable simply begs the question of how one determines corporate responsibility in this context. There is no evidence or reason to believe that application of state corporation law would allow truly "responsible" parties to escape liability. The Government has not demonstrated that state veil-piercing law permits corporate parents to avoid liability when the distinction between the parent and its subsidiary is a sham, or creates "safe havens" for polluters. Indeed, there would be no incentive for States to shield culpable corporate entities from liability, because States have very substantial interests in protecting their citizens and state resources, and in remedying environmental contamination in their States. *See generally* MDEQ Br. at 1-2; Brief of Amici States at 1-2.

To the extent the Government is arguing that corporate shareholders should be held liable even when state law

would shield them from liability, in order to enlarge the pool of parties available to pay cleanup costs and to protect taxpayers from bearing the cost of hazardous waste cleanup, the *O'Melveny* Court expressly rejected such an argument for the creation of federal common law. Similar to the Government here, the FDIC argued in *O'Melveny* "that it would disserve the federal program to permit California to insulate the attorney's . . . malpractice, thereby imposing costs on the nation's taxpayers, rather than on the negligent wrongdoer." 512 U.S. at 88 (quoting FDIC's brief). The Court found that reasoning "positively probative of the dangers of [a] facile approach to federal-common-law-making." *Id.* To paraphrase the Court, "[b]y presuming to judge what constitutes [a parent corporation's being responsible], this argument demonstrates the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id. See also United States v. Kimbell Foods, Inc.*, 440 U.S. at 737-38 (similarly rejecting "more money" arguments); *United States v. Yazell*, 382 U.S. 341, 348 (1966) (same).[32] In any event, CERCLA's scheme of both strict and joint and several liability ensures that in virtually all cases, private resources will pay for the cost of cleanup. And even where no private "responsible parties" are available, the Superfund—not the taxpayer—bears the cost.[33]

In sum, there is no basis for concluding that Congress intended to displace traditional state law rules of limited

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[32] A finding that application of state law would significantly conflict with the objectives of CERCLA requires more than a showing that the United States would lose particular law suits. *See Robertson v. Wegmann*, 436 U.S. 584, 593 (1978) (noting that otherwise "the appropriate rule would then always be the one favoring the [United States] and its source would be essentially irrelevant").

[33] The Superfund is funded principally by a tax on chemical, crude oil, and petroleum products and by a corporate environmental tax. *See* 26 U.S.C. §§ 59A, 4611, 4661, 9507(b).

liability, particularly the state law rules for determining when a parent corporation should be deemed liable for acts ostensibly by and on behalf of a subsidiary, in the context of determining which corporate entities should be deemed "operators" under CERCLA. And there is no reason to conclude that state law would significantly frustrate CERCLA's purposes. Accordingly, the presumptive and general rule should apply, and corporate liability issues not clearly governed by CERCLA should be resolved by reference to state law.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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